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OCTOBER TERM, 1975

THE CITY OF EASTLAKE, et al.,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN SOCIETY OF PLANNING OFFICIALS, AND AMERICAN INSTITUTE OF PLANNERS

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Ford v. *Baltimore County,* 268 Md. 172, 300 A.2d 204 (1973) 21

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Forestview Homeowners Ass'n., Inc. v. *County of Cook,* 18 Ill.App.3d 230, 309 N.E.2d 763 (*Leave to Appeal den'd,* 56 Ill.2d 582 (1974) 28

Forman v. *Eagle Thrifty Drugs and Markets,* 89 Nev. 533, 516 P.2d 1234 (1973) 35, 40, 41

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Linden Methodist Episcopal Church v. *City of Linden,* 113 N.J.L. 188, 173 A. 593 (1934) 19

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Minneapolis-Honeywell Regulator Company v. *Nadasdy,* 247 Minn. 159, 76 N.W.2d 670 (1956) 39

National Land Investment Co. v. *Kohn,* 419 Pa. 504, 215 A.2d 597 (1965) 16

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State ex rel. Hunzicker v. *Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934) 41

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American Law Institute, *A Model Land Development Code*, Proposed Official Draft, April 15, 1975 14

Anderson, *The American Law of Zoning*, (1968) 20

Babcock, *The Chaos of Zoning Administration*, 12 Zoning Digest 1 (1960) 17

Babcock, *The Zoning Game*, (1966) 36

Babcock and Bosselman, *Exclusionary Zoning: Land Use Regulation and Housing in the 1970's* (1973) 18

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Bettman, *Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, The National Housing Association, and the Massachusetts Federation of Town Planning Boards of Amici Curiae, Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 7

Bettman, *City and Regional Planning Papers*, (1946) 16

Blucher, *Is the Tail Wagging the Dog*, Planning (1955) 16

Bosselman and Callies, *The Quiet Revolution in Land Use Controls*, Council on Environmental Quality (1971) 45

Chamberlain, *Zoning Progress*, 15 ABA Journal 535 (1929) 10

Federalist Papers #10 46

Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 Ill.L.Rev. 135 (1929) 9, 10, 13

Haar, *In Accordance With A Comprehensive Plan*, 68 Harvard Law Review 1154 (1955) 10, 25-26

Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. Pa. L. Rev. 47 (1965) 12, 14

Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 Washington U. Law Quarterly 66 32

Mandelker, *The Zoning Dilemma* (1971) 20

McCormack, *A Law Clerk's Recollections*, 46 Columbia L. Rev. 710 (1946) 7

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Metzenbaum, *The Law of Zoning* (1955) 7

O'Leary, "Growth vs. No-Growth: The Suburban Dilemma," *Management and Control of Growth*, Vol. 1 ULI (1975) 17

Standard Zoning Enabling Act, U.S. Dept. of Commerce (1922) 10

Sullivan and Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 Urban Law Annual 33 (1975) 10

United States Dept. of Commerce, *Survey of Zoning Laws and Ordinances* 2, (1928) 10

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BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN SOCIETY OF PLANNING OFFICIALS, AND AMERICAN INSTITUTE OF PLANNERS

INTEREST OF AMICI CURIAE

This Amici Curiae brief is respectfully submitted by the National Association of Home Builders, American Society of Planning Officials, and American Institute of Planners, in support of respondent, Forest City Enterprises, Inc. with the consent of all the parties to this case, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States.

The National Association of Home Builders (NAHB) is a professional trade association representing the home building industry. With its more than 600 affiliated state and local associations and over 76,000 members, NAHB is the voice of America's housing industry.

Builder members vary in their operations. They construct single-family homes, townhouses, condominiums and apartments; shelter for people in all walks of life. They also build the schools, churches, shopping centers, and other commercial structures which are so vital to our communities.

Associated with the builders in NAHB are architects, engineers, financial institutions, public utilities, manufacturers, retail and wholesale firms, subcontractors, and other professionals and businesses related to the home building industry.

As a representative of the housing industry NAHB believes that it is obliged to express its views on the significance of the case now before this Court. Construction, whether it be of houses, schools, churches, or commercial structures, often can only occur after a builder is granted appropriate zoning. Since 1926 when this Court first considered the legal validity of zoning and established the process and standards by which land use decisions are to be implemented, builders have been provided a degree of certainty as to where they can and cannot build by the standards and provisions contained in zoning ordinances. The Eastlake charter amendment strikes at the heart of this certainty. At a time in our history when the housing industry is experiencing its most severe economic decline since World War II, Eastlake has imposed an additional and constitutionally suspect obstruction in the path of orderly community development, thereby further impeding the ability of this industry to assist the country in meeting its housing needs.

The American Society of Planning Officials (ASPO) is a national, nonprofit membership association devoted to the development and effective application of the best techniques for managing the development of cities, regions, states and the nation. ASPO brings together the professional planner and citizen member of local boards and commissions from urban, suburban and rural areas; the elected official and community groups; the developer and development regulator; the practitioner, student and academician. Founded in 1934, ASPO presently has more than 13,000 members.

ASPO pursues the objectives of the former National Conference of City Planning, one of the amici in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and was served by Alfred Bettman, author of the National Conference's amici brief in *Euclid,* as its founding president. ASPO administers a fund, in memory of Bettman with which it regularly holds symposia on issues of planning law.

As a service organization, ASPO facilitates communication among all groups in planning. It serves as the national clearing house for planning information and identifies and analyzes important trends in the planning field. Through contract research and membership service programs, ASPO provides the professional planner, government agency, and other interested persons with current information on planning and advice on emerging developments in the field.

American Institute of Planners (AIP) is the national organization of professional urban and regional planners in America. Its members work for city, county, regional, state and national governments, as well as with private consulting firms. Approximately 10 per cent of its members work for university and research organizations. The principal current concerns of the organization are with the critical issue of urban growth and change and their

coordination with environmental and social policies. The purpose of AIP is to encourage orderly growth and development responsive to the needs and problems of society. AIP was founded in 1917 and it presently has a membership of 12,000 in 39 chapters across the United States.

AIP believes an ongoing planning process is essential to a fair administration of land use policies and regulations. It has been a consistent principle of AIP since its inception over half a century ago that land use planning and land use controls are inextricably intertwined, and are necessarily so if rational provision is to be made for the use of land on a basis which benefits the community as a whole and is consistent with the reasonable interests of individual property owners.

SUMMARY OF THE ARGUMENT

> "Decisions which amend or change conditions under existing zoning laws therefore require an extremely sensitive balance between individual rights and the public welfare." *Fleming* v. *City of Tacoma,* 81 Wash. 2d 292, at 295; 502 P.2d 327, at 329 (1972).
>
> ". . . the comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll." *Udell* v. *Haas,* 21 N.Y.2d 463, at 469; 288 N.Y.S.2d 888, at 893-94 (1968).

Almost half a century and more than 10,000 reported zoning cases after the decision of this Court in *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), the Village of Eastlake, Ohio has devised a scheme to upset the delicate balance between rights in private property and

the police power, that "least limitable of governmental powers." *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, at 83 (1946.)[1]

The opinion in *Euclid* represented a major departure from traditional legal doctrine concerning the legitimate grasp of public regulation on the use of private property. That decision was reached only after considerable travail by this Court and not until it was persuaded, on rehearing, that the restrictions imposed by zoning were a result of careful deliberation and planning.

Judicial scrutiny of municipal zoning practice by the state courts during the fifty years since *Euclid* is a history of increasing insistence by those courts that the zoning power be processed fairly and be based not upon popular or official whim but upon forethought and study.

The state courts have come to regard these procedural and substantive safeguards as essential to meet the due process imperatives of the Fifth and Fourteenth Amendments to the United States Constitution in a system of municipal law where opportunities to seek change in response to individual petitions are so dominant a feature. These state courts, after more than five decades of disposing of zoning litigation—substantially all of it involving dis-

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[1] Norman Williams, Jr., in his recent 5-volume work, *American Land Planning Law* (1975), states that up to 1969 there had been more than 10,000 reported zoning decisions, p. vii. With few exceptions, most of these have been in the state courts. In the forty-six years between the decision in *Nectow* v. *City of Cambridge,* 277 U.S. 183 (1928), and the decision in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), this Court decided only one zoning case, *Seattle Title and Trust Co., Trustee* v. *Roberge,* 278 U.S. 116 (1928). In *Roberge* a consent provision in a zoning ordinance which delegated legislative power to neighbors was "repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 122.

putes over requests for changes—have recognized the essential distinction between the initial enactment of a *comprehensive* zoning ordinance applicable to all, and an individual request for a change.

A decision to adopt or reject a comprehensive zoning ordinance represents a community-wide policy. A petition for a change for a particular tract is at bottom a dispute among competing interests: the landowner-petitioner, the landowner-neighbors, and the community at large. It is in this contest of private interests over the rezoning of particular parcels that the state courts have shown most concern that a fair process be maintained and that the substantive decisions be based on forethought, whether it is the petitioners or the neighboring objectors who believe they were injured by a local decision. In either instance, a decision to deviate or not to deviate from the general rule established by the comprehensive zoning plan can impinge on property rights. The state courts have insisted that decisions to grant or deny petitions to rezone, pitting as they do conflicting property interests against each other, must be based on the most punctilious balancing of the public welfare and individual rights.

A mandatory referendum upon every proposed zoning change is antithetical to such a thoughtful evaluation of all the facts. Such a referendum subjects what is essentially an adjudicative process by the municipal decisionmakers to ratification or rejection by a show of hands. A mandatory referendum on a zoning change is hardly distinguishable from a popular vote upon a judicial or administrative decision where private interests are being weighed against the use of the police power.[2]

[2] The appropriate balance between private rights in property and the police power is one of the important distinctions between this case and *James* v. *Valtierra*, 402 U.S. 137 (1971). In *James* no issue of a restraint upon private property was involved. It was not a police power case.

ARGUMENT

THE DECISION IN EUCLID WAS A SIGNIFICANT EXTENSION OF THE POLICE POWER AND IT WAS BASED UPON A VIEW OF ZONING AS A DELIBERATIVE AND CAREFULLY STUDIED PROCESS.

The decision of this Court in the *Euclid* case was not reached easily. It came only after the Court, of its own motion, set the case for reargument and had the benefit of an illuminating *amicus* brief by Alfred Bettman,[3] a member of the Cincinnati Bar distinguished for his contributions to the rationale behind zoning in its early days.[4]

The opinion in *Euclid* represented a major shift from the traditional judicial position on the scope of the police power. The then accepted view was that the police power could cut back on private rights only when public health or safety were directly involved (fire and pestilence). The *Euclid* decision was a judicial acknowledgment that the police power could be used to preserve and protect urban amenities. In spite of Justice Sutherland's use of the nuisance law as an analogue, he acknowledged that under zoning regulations which authorized the exclusion of nonnuisance uses from residential districts "[t]he bad fades into the good by such insensible degrees that the two are

[3] Brief for Amici, The National Conference on City Planning, The Ohio State Conference on City Planning, the National Housing Association, and the Massachusetts Federation of Town Planning Boards. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *see also* McCormack, *A Law Clerk's Recollections*, 46 Columbia L. Rev. 710 (1946); Metzenbaum, *The Law of Zoning* (1955).

[4] Bettman, *City and Regional Planning Papers* (Harv. Univ. Press, 1946).

not capable of being readily distinguished and separated in terms of legislation." 272 U.S. 365, at 389.

It was undoubtedly this awareness that zoning involved far more subtle values than were at stake in common law nuisances and special fire ordinances, and that there was, therefore, a greater potential for discrimination or unfair invasion of private rights, that led the Court in *Euclid* to observe:

> "The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports." (272 U.S. 365, at 394)

Justice Sutherland quoted extensively from the opinion of the Illinois Supreme Court a year earlier in *City of Aurora* v. *Burns,* 319 Ill. 84, 149 N.E. 784 (1925) which had upheld the principle of zoning. In that opinion the Illinois court observed:

> "The ordinance is the result of more than seven months of study and planning, with the aid of expert advice." *Id.* at 98, and 789.

Mr. Bettman in his brief for *amici* in *Euclid* repeatedly stressed the studies and forethought that underpinned a zoning ordinance:

> "[T]he technique of zoning has advanced to the comprehensive type, which includes height, use, and area regulation as parts of a single plan, *based on careful surveys,* made more reasonable by careful adjustment to the economic, as well as social, factors involved. In the comprehensive ordinance, the locating of the districts and the height, use and area standards are adjusted to *a carefully wrought plan* for the promotion of the health, safety, convenience, and welfare of the whole community." Brief for Amici, p. 8. (Emphasis added)

Later in his brief, Mr. Bettman added:

> "[Zoning] represents the application of foresight and intelligence to the development of the community. If the plan be well made as a result of a careful survey, it is fair and just, for in exchange of the restrictions which it places on each piece of property, it places restrictions for each piece of property *(sic)*, that is for the benefit of each piece of property, and protects each piece of property as well as gives to each piece of property its share of the general health, order, convenience and security which the whole plan brings to the community." *Id.* at 37.

The importance of the deliberative process behind zoning was central to the Bettman brief. This Court, in response, acknowledged the necessity of such a foundation in a system of municipal law where "the bad fades into the good by such insensible degrees."

It was the planning and deliberation that presumably preceded a zoning ordinance which held out the assurance that a "reciprocity of benefits" would protect individual property owners from invidious discrimination.[5]

Three years after *Euclid,* Professor Ernst Freund, auther of *The Police Power,* expressed concern over the potential for unfair treatment when a zoning law, necessarily general in its terms, was applied to specific parcels or geographic areas:

> "Clearly one of the outstanding difficulties of the law of zoning is the irreducibility to type of the situations with which it deals. . . . The irreducibility of areas to types entails the irreducibility of equities to

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[5] "It would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." Holmes, J., *Noble State Bank* v. *Haskell,* 219 U.S. 104, at 111 (1911).

> abstract formulas, and the consequent loss of one of the main safeguards of equal justice, necessitating the search for some substitute. . . . *Hence, the device of the comprehensive plan as one of the main features of zoning legislation.*" (Emphasis added) Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning,* 24 Ill. L. Rev. 135, *op. cit.* note 6, at 141-42 (1929).

Indeed, in 1922, model zoning legislation, the Standard State Zoning Enabling Act, had been published by the United States Department of Commerce[6] and had been enacted by 45 states within a year after this Court decided *Euclid.*[7] That model mandated that zoning regulations must be "in accordance with a comprehensive plan," and most states included the phrase in their enabling acts.[8]

The precise meaning of "a comprehensive plan" has been occasion for debate through the years;[9] but at a minimum the phrase must mean that zoning is to be based on some process of deliberation and analysis.

> "The draft statute [The Standard Act of 1922] stresses the importance of a comprehensive plan as a basis for zoning. This is vital to prevent zoning becoming a mere means of protecting the interests of individuals in a small area without regard to the general interests of the city." Chamberlain, *Zoning Progress,* 15 ABAJ 535, at 537 (1929).

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[6] Standard State Zoning Enabling Act (SSZEA), United States Department of Commerce (1922).

[7] *Survey of Zoning Laws and Ordinances* 2, United States Department of Commerce (1928).

[8] SSZEA, Section 3.

[9] Haar, *In Accordance With a Comprehensive Plan,* 68 Harv. L. Rev. 1154 (1955); Sullivan and Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement,* 9 Urban Law Annual 33 (1975).

The decision in *Euclid* and Bettman's brief were focused on the legitimacy of the *initial* adoption of a comprehensive zoning law. A deliberative process considers existing land use plans, the recommendations of planners, the comments and consensus of the public at large, studies by engineers and environmentalists, and the rights of the property owner. Land use decisions made by elected officials must be based upon this deliberative process. If a concern for rationality and deliberation, in short, for the quality of analysis that goes into such a restriction on private rights is a necessary predicate to the initial enactment, as this Court and Bettman clearly regarded it, *amici* respectfully suggest that an equal or greater concern for evidence of fairness and an absence of capriciousness must, *a fortiori,* be present when individual petitions for change in the district classifications provided for in the comprehensive zoning law are at stake. It is in these subsequent particularized actions that the opportunity for special favors or the denial of equitable treatment requires the most forceful insistence upon fair play—and in zoning the name of the game is change.

THE PROBABILITY OF INDIVIDUAL REQUESTS FOR CHANGE IS A UNIQUE FEATURE OF ZONING. THIS MAKES THE QUALITY OF DELIBERATION AND THE FAIRNESS OF THE PROCESS WHEN CHANGE IS CONSIDERED, ESSENTIAL TO ENSURE DUE PROCESS.

The hallmark of zoning is the opportunity for individuals to petition for relief—to seek a change—from the general comprehensive zoning plan. This has to be when the inevitability of change in the use of land is considered. Cornfields will be proposed for residential subdivisions; old brownstones are sought to be demolished to make room

A SHOPPING CENTER

for high-rises; and, may soon be proposed on land zoned for industrial use.

From the early decades of this century down to today, American zoning ordinances have recognized the dynamics of land use. In response, zoning ordinances authorize, if not invite, in a manner and to an extent foreign to other municipal regulations, individual petitions for relief.

All zoning ordinances provide for amendments, most zoning ordinances permit variances, and many zoning ordinances authorize another breed of change from the general legislative rules known as "special exceptions," "conditional uses" or "special permit uses." In more recent years additional, more sophisticated and more complex opportunities for private parties to petition for change have been added to these more traditional sources of relief.[10] Whatever they are called, however rudimentary or sophisticated they may be, and by whatever public body they are considered, this panoply of devices fulfills the expectation of all concerned that the comprehensive legislative plan of the zoning ordinance must provide opportunities for change.

> "Zoning maps are constantly being changed, for various reasons; and the question is, under what circumstances are such changes justified. . . . The problem is then to develop criteria for distinguishing valid from invalid zoning changes; . . ." Williams, *op. cit.* note 1, Vol. 1, at 6.

[10] These may, for example, take the form of "floating zones" which appear in the text of the zoning ordinance but are not placed on the zoning map until a specific request of a petitioner that his land be so classified is granted. *Rogers* v. *Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951). "Planned Unit Developments" are, in effect, a procedure to permit a petitioner to propose a development, usually of large acreage, that avoids the rigid regulations for separate lots and yards normally associated with standard zoning regulations. Krasnowiecki, *Planned Unit Development: A Challenge To Established Theory and Practice of Land Use Control*, 114 U. Pa. L. Rev. 47 (1965).

And, Ernst Freund:

> "Legally, all zoning enabling acts contemplate the possibility of dezoning, the power to amend zoning ordinances serving that purpose. The provisions do not show on their face whether they are intended to remedy particular errors or hardships or whether they contemplate readjustments called for by the changing character of neighborhoods; undoubtedly, however, they may be made available for either purpose." Freund, *op. cit.* at 145.

State courts have understood this unique feature of the zoning process. Justice Levin of the Michigan Supreme Court, concurring in *Kropf* v. *City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974), observed:

> "For most communities, zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances—reflecting, generally, decisions made on individual grounds—brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and, as important as any, market and consumer choice." *Id.* at 168 and 191-92.

Amici know of no other system of municipal law where the right to request a new set of rules for an individual is so dominant a feature. To our knowledge no building code allows a building owner to petition for relief from a requirement that all elevators have emergency brakes; no health code allows a restaurant owner to be exempt from minimum standards of cleanliness; no traffic code invites

a driver to be given a "variance" to go 50 mph in a 35 mph zone.

The American Law Institute has recently published *A Model Land Development Code,* the first such national prototype since The Standard State Zoning Enabling Act of 1922. The Reporters of that Code make the following observation:

> "A person who looks at the text of a zoning ordinance or the zoning map in order to ascertain the community's policies toward land use may be accumulating only meaningless information. As [Professor] Jan Krasnowiecki [Pennsylvania School of Law] has described it, 'the community's real land use policy comes to be expressed in the zoning amendment'." American Law Institute, *A Model Land Development Code,* Proposed Official Draft, April 15, 1975, Art. 4, p. 176 citing Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation* v. *Administrative Discretion,* in Marcus & Groves, eds., *The New Zoning: Legal, Administrative and Economic Concepts and Techniques,* 3, 6 (1970).

The distinction in zoning is apparent: compared to building, health and traffic codes which relate to "hard" issues of public health and safety, the zoning ordinance, as an exercise of the police power is constructed on more subtle considerations of public welfare and represents such a direct threat to constitutionally protected private rights in property that the opportunity to petition for change is imperative. This has been so recognized in a multitude of forms, from the simple zoning ordinances of the 1920's to the highly sophisticated ordinances of today.

> "Differential treatment is of the essence in American land use controls. Since by definition a formal and mechanical equality is out of the question, *the only way to provide the essence of equal treatment for these basic social interests is by an overall planning analysis*

> *of all the major factors bearing upon the situation.*" Williams, *op. cit.* note 1, Vol. 1, at p. 5. (Emphasis added.)

If opportunity for change is the distinctive feature of zoning, then the *process* by which a petition for change from the general law is deliberated, and the standards by which change is granted or denied become central to fairness, to what we now regard as due process of law. This essential fairness is imperative to keep secure the rights in property, whether these be the rights of the property owner who petitions for a change, or those of the neighboring property owners who believe a change will damage their land values as they perceive them.

> "Fourth, land use controls affect basic rights and sensitive issues more broadly. For the landowner (as resident, and as potential developer), this includes the right to use one's own land for various purposes, including many of those activities which make up a lifestyle—plus the chance to make money from using the land. For residents (landowners or tenants), in their role as neighbors, this involves the enjoyment of their homes, free from unpleasant intrusions resulting from neighboring land use." Williams, *op. cit.* note 1, Vol. 1, pp. 4-5.

Given this inherent character of the zoning process, it is a sardonic fact that the unbroken thread of criticism of zoning law, from the early days to date, has been its unfair process and its tendency to grant special favors or to refuse to correct patent inequities, without due deliberation. The literature of zoning carries the constant refrain that the process involved in the grant or denial of change by whatever local body—city council, plan commission or board of zoning appeals—has been devoid of elementary standards of fairness and forethought.

Twenty years ago the typical charge was that local agencies were too generous with special dispensations.

Walter Blucher, former Executive Director of the American Society of Planning Officials and one of the nation's most outstanding planning lawyers, put it this way:

> "The question must be asked seriously whether zoning, as it is currently being practiced, is endangering our democratic institutions.
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> • • •
>
> "There are several reasons for this degeneration of zoning. One is the failure to provide a really adequate land use plan or the comprehensive plan called for by many zoning statutes as the basis for zoning.
>
> • • •
>
> "Anarchy is the proper term for what is taking place . . . The spirit of zoning is being violated by legislative bodies." Blucher, *Is The Tail Wagging The Dog?*, in Planning (American Society of Planning Officials, 1955) pp. 96, 100.

In more recent years, as the use of zoning has been regarded by some critics as a device to keep out unwanted economic or racial groups, the criticism of the process has been that local legislative bodies have been too reluctant to grant changes, that zoning has become a method for preventing any change, however the property owner or others may be injured.

The Pennsylvania Supreme Court expressed this concern as follows:

> "Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *National Land Investment Co.* v. *Kohn*, 419 Pa. 504, 527-28, 215 A.2d 597, 610 (1965).

A commentator on the zoning process used more colorful terms:

> "The lack of accepted guidelines for determining what kind and rate of growth is best for a given community, the wide divergence of opinion between the developer and the no-growth proponents, and the highly emotional questions involved have, inevitably, given many recent hearings the flavor of an old-fashioned public hanging, with the developer on the destructive end of the rope.
>
> "In such confrontations, the local officials sit uncomfortably between the opponents. They are expected to summon the wisdom of Solomon (who never had to worry about re-election) in evaluating and ruling on the advisability of development vs. no development. Painfully aware that any acquiescence to the developer's point of view must be accompanied by the strongest possible justification in terms of environmental as well as economic good (lest they also be placed in the noose), elected officials often opt for the moratorium approach." O'Leary, *Growth vs. No-Growth: The Suburban Dilemma*, in Management and Control of Urban Growth, Vol. 1, p. 50 (Urban Land Institute, 1975).

Throughout zoning's history the criticism, whatever its tilt, has had a common theme: local zoning was abusive of due process, both procedurally and substantively.

> "Shorn of all pretentious planning jargon, zoning administration is exposed as a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which disputes are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused *ad hoc* injunctions of bewildered courts." R. Babcock, *The Chaos of Zoning Administration*, 12 Zoning Digest 1 (1960).

Euclid sustained the principal of zoning. The opinion of this Court in *Nectow, supra*, demonstrated that the *Euclid*

decision had not been intended as a license to ignore standards of fairness and rationality in the process of making zoning decisions. This history of zoning since *Euclid* and *Nectow* reflects the growing concern and the increasingly successful effort of the state courts to bring reason, both substantive and procedural, to the zoning process.

It is the lack of deliberation and care, inevitable in a mandatory plebiscite, that is at issue in this cause.

THE HISTORY OF ZONING, PARTICULARLY IN RECENT YEARS, REFLECTS THE INCREASINGLY EFFECTIVE EFFORTS OF STATE COURTS TO CORRECT ABUSES IN THIS USE OF THE POLICE POWER TO REGULATE LAND.

Students of zoning history like to divide the development of zoning law into time periods, a somewhat artificial exercise but useful nevertheless to an understanding of where this system of law stands today.[11] In the more recent of these periods the state courts have demonstrated a suspicion that local decision-making frequently was not based upon the kind of careful analysis and study attributed to zoning by Bettman and assumed by the Court in *Euclid*. In response, the state courts have progressively imposed a greater burden of deliberation upon local decision-making bodies when they address individual requests for change.

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[11] See Babcock and Bosselman, *Exclusionary Zoning: Land Use Regulation and Housing in the 1970's*, Chapter 2 (Praeger Press, 1973). The authors suggest three periods. Williams, *op. cit.* note 1, Vol. 1 ch. 5, suggests four periods. Both texts agree that the early tendency of the state courts to be generous to developers then changed to one of a sympathy with municipal resistence to proposals for change, and in the past few years has shown a trend to regard local obduracy with skepticism.

Even when the courts—as they usually did—refused to read the customary statutory phrase "in accordance with a comprehensive plan" to mean that there must be a separate document such as a master plan on which the zoning ordinance was based, the courts at least agreed that the phrase does require changes in zoning to be based upon a rational, deliberative course of action and be free of the "capricious exercise" of power. *See Kozesnik* v. *Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957); and *Jablon* v. *Town Planning & Zoning Commission of Town of Newtown*, 157 Conn. 434, 254 A.2d 914 (1969).

The path the state courts have sought to blaze in an effort to bring a semblance of reason and fairness to the conflicting private interests involved in zoning changes has been tortuous and not always well marked. But such a trail is being cut and its course has become more apparent as zoning has become a major social and economic issue in this country.

The following judicial doctrines reflect this concern over what the zoning process is all about.

1. The rule against "spot zoning."

The development of the doctrine of the invalidity of "spot zoning" represented an early and crude effort by the courts to discourage the grant of special favors by local legislatures to one landowner at the expense of neighboring landowners.

The statement of the Supreme Court of New Jersey in *Linden Methodist Episcopal Church* v. *City of Linden*, 113 N.J.L. 188, 173 A. 593 (1934) is typical:

> "An attempt to wrench a single small lot from its environment and give it a new rating that disturbs the tenor of the neighborhood should receive the close

scrutiny of the courts lest the zoning enactments, constitutional and legislative, be directed from their true objectives. I conclude that the ordinance is not a reasonable exercise of municipal power." *Id.* at 191 and 595.

One of the country's most distinguished legal authorities on zoning explained "spot zoning" as follows:

> "If one developer receives a zoning amendment for apartment development in one quadrant [of an intersection], why can't another developer likewise receive a zoning amendment for apartment development in another quadrant? The situation suggests favoritism and discrimination and the courts are skeptical. They exhibit their skepticism by characterizing a rezoning of this kind as a 'spot' zoning, with overtones that it is presumptively invalid." Mandelker, *The Zoning Dilemma,* 72 (1971). See also Anderson, *The American Law of Zoning*, § 5.04-§ 5.13 (1968).

2. The judicial concern that the balancing of private rights and the police power was too often a numbers game.

The state courts have not only been concerned with the risk that the opportunity for zoning changes would be used to dispense special favors. The courts have been disturbed by growing evidence that refusals of local public agencies, legislative or administrative, to grant changes to petitioners were unduly influenced by popular pressures, by petitions with a multitude of signatures or by the number of objectors or the decibel level of their voices at public hearings. The following are illustrative:

In Maryland:

> "But in restricting individual rights by exercise of the police power *neither a municipal corporation nor the state legislature itself can deprive an individual*

> *of property rights by a plebiscite of neighbors or for their benefit.* . . . There is no magic in the word 'zoning,' but there is a wide difference between exercise of the police power in accordance with a comprehensive zoning plan which imposes mutual restrictions and confers mutual benefits on property owners, and arbitrary permission to A and prohibition to B to use their property, at the pleasure of neighbors or at the whim of legislative or administrative agencies." *Benner* v. *Tribbitt*, 190 Md. 6, 20, 57 A.2d 346, 353 (1948). (Emphasis added.) See also *Ford* v. *Baltimore County*, 268 Md. 172, 300 A.2d 204 (1973).

In Florida:

> "There must be a positive showing of physical, economic or social change rather than esthetic or group caprice to justify the release of zoning regulations. Neither will they be released at the behest of community or group pressure, if in doing so constitutional guarantees are undermined." *Siegel* v. *Adams*, 44 So. 2d 427, 428 (Florida 1950).

In Indiana:

> "The determination of a petition for a variance cannot be determined by a poll of the sentiment of the neighborhood." *Town of Homecroft* v. *Macbeth,* 238 Ind. 57, 63, 148 N.E.2d 563, 566 (1958).

In Rhode Island:

> "It is also not a proper exercise of such authority to base their decision [on a rezoning] merely on 'strenuous objections of residents of the Town' as [the Board] does in reason (3). Such remonstrances may be heard and taken into consideration but they may not be permitted to control the board's decision. *Heffernan* v. *Zoning Board,* 50 R.I. 26, 144 A. 674. A poll of the neighborhood to weigh the conflicting wishes of the residents or landowners in the vicinity is not the purpose of the hearing." *Kent* v. *Zoning Board of Town of Barrington,* 74 R.I. 89, 92, 58 A.2d 623, 624 (1948).

In Louisiana:

> "We are convinced from the testimony of the aldermen that the Board substantially based its decision denying the rezoning classification request on the objections voiced by some of the voters residing in the area.
>
> "This cannot be the basis upon which public officials are called upon to act." *Jemison* v. *City of Kenner,* 277 So. 2d 728, 730 (Louisiana 1973).

In New York:

In this case, the plaintiff's property was first rezoned to light industrial and then rezoned back to residential after considerable public protest was raised. The Court said:

> "The zoning power, as limited by the statutory grant, must operate in relation to use of land and not for the accomplishment of purposes extraneous to that relation. . . . In our opinion, the balance between the State and the individual was not properly maintained by imposing the burden of economic disadvantage on the respondent *to pacify* the anger of the protestants. . . ." *DeSena* v. *Gulde,* 24 App.Div.2d 165, 171, 265 N.Y.S.2d 239, 246 (1965). (Emphasis added.)

In other cases the courts have been offended by conduct at statutory public hearings which made a mockery of the deliberative process. By way of example:

In Michigan:

The Supreme Court overruled a denial for a zoning change, and stated that the Board had acted:

> ". . . under the impact of a completely committed audience reaction . . . the audience came thoroughly committed to blocking the construction of the plant . . . the crucial decision . . . was made by five members of the township board under the immediate impact of their constituents. *Certain-Teed Products Co.* v. *Paris Township,* 351 Mich. 434, 446, 88 N.W.2d 705, 711-712 (1958).

In Georgia:

> "The evidence in this complaint for injunctive relief shows 36 zoning petitions were scheduled to be heard before the Commissioners of Clayton County on October 11, 1972, at 7:30 o'clock p.m.; that the hearings continued until 3:30 o'clock a.m., October 12, 1972; that from 1,200 to 1,500 people were present to attend the public meeting; that the hearings were held in the commissioners' hearing room, which accommodates approximately fifty people; that there were three other larger rooms in the courthouse where the hearings could have been legally held; that people were packed so closely in the entire corridor outside the hearing room that those interested in various petitions could not get close to the door, much less inside the hearing room. Zoning is a matter of highest governmental business." Quoting with approval the findings of the trial court. *Pendley* v. *Lake Harbin Ass'n.,* 230 Ga. 631, 633-34, 198 S.E.2d 503, 505 (1973).

The state court judges in these cases sensed that the police power was based predominantly on a popularity contest, not on the deliberation and careful balancing of competing private and public interests that were presumed to justify zoning restrictions.

3. The increasing judicial insistence that decisions to make or deny changes in the zoning ordinance show evidence of forethought and deliberation.

> "What, in truth, was the warrant for the Board's action? We are not told. The Board says we do not have to be told." *Tireman-Joy-Chicago Improvement Ass'n* v. *Chernick,* 361 Mich. 211, 214, 105 N.W.2d 57, 58 (1960).

What has been taking place among the state courts in zoning cases appears to be a response to Justice Talcott Smith's protest in *Tireman-Joy.*

The New York Court of Appeals has provided one of the most thoughtful analyses of the way that zoning works and the necessity for deliberation when changes are proposed in an ordinance. That decision is *Udell* v. *Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968). The local governing body had changed by an amendment to the map a parcel of land on the edge of the Village from a business zone to a residential zone. The court found that this act was not consistent with a long-established community policy of encouraging commercial development on the periphery of the municipality.

The court first returned to the origins of zoning:

> "Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> "This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a 'well-considered plan' or a 'comprehensive plan' is reflection of that view. . . . In exercising their zoning powers the local authorities must act for the benefit of the community as a whole following a *calm and deliberate consideration of the alternatives and not because of the whims of either an articulate minority or even a majority of the community. DeSena* v. *Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 [2d Dept., 1965]. Thus the mandate of the Village Law (§ 177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. *Rather the comprehensive plan is the essence*

> *of zoning.* Without it, there can be no rational allocation of land use. It is the assurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll. . . .
>
> "*Moreover, the 'comprehensive plan' protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials.*" *Id.* at 469 and 893-94. (Emphasis added.)

The Court, after referring extensively to Professor Haar's seminal article *In Accordance With a Comprehensive Plan, op. cit.* note 11, *supra,* said:

> "One of the key factors used by our courts in determining whether the statutory requirement has been met is whether forethought has been given to the community's land use problems." *Id.* at 470 and 894.

On the necessity of deliberation when changes are sought, the court added:

> "In recent years, many experts on land use problems have expressed the pessimistic views that the task of bringing about a rational allocation of land use in an evermore urbanized America will prove impossible. *But of one thing, we all may be certain. The difficulties involved in developing rational schemes of land use controls becomes insuperable when zoning or changes in zoning are followed rather than preceded by study and consideration.* By this statement, we do not mean to imply that the courts should examine the motives of local officials. What we do mean is that the courts must satisfy themselves that the rezoning meets the statutory requirement that zoning be 'in accordance with [the] comprehensive plan' of the community." *Id.* at 471 and 895. (Emphasis added.)

On the interest of the public at large in such private disputes the court commented as follows:

"These vague desires of a segment of the public were not a proper reason to interfere with the appellant's right to use his property in a manner which for some 20 odd years was considered perfectly proper. If there is to be any justification for this interference with the appellant's use of his property, it must be found in the needs and goals of the community *as articulated in a rational statement of land use control policies* known as the 'comprehensive plan.'" *Id.* at 476 and 899. (Emphasis added.)

In 1973 the New York Court of Appeals reaffirmed the *Udell* rationale in *Town of Bedford* v. *Village of Mount Kisco,* 33 N.Y.2d 178, 351 N.Y.S.2d 129 (1973):

"We have held that zoning changes must indeed be consonant with a total planning strategy, reflecting consideration of the needs of the community (*Udell* v. *Haas,* 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897). *What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational ad hocery.* The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan. Indeed sound planning inherently calls for recognition of the dynamics of change." *Id.* at 188 and 136. (Emphasis added.)

The Supreme Court of Washington in *Fleming* v. *City of Tacoma,* 81 Wash.2d 292, 502 P.2d 327 (1972), spoke in terms similar to the *Udell* opinion. The court underscored the importance of planning as evidence of rational decision-making when a zone change is under consideration:

"We have long passed the time when one may use his land as he wishes provided it creates no nuisance. The concentration of population and the infinite variety of modern land uses necessitate effective land use planning. The restrictions on use, inherent in zoning,

insure that if one uses his property in a way harmonious with the existing zoning codes, he will be free from the danger that the future use of his neighbor's land might be detrimental to or foreclose his own established use. *Decisions which amend or change conditions under existing zoning laws therefore require an extremely sensitive balance between individual rights and the public welfare."* Id. at 295 and 329. (Emphasis added.)

The Virginia Supreme Court, in *Board of Supervisors of Fairfax County* v. *Snell Construction Company,* 214 Va. 655, 202 S.E.2d 889 (1974) invalidated a rezoning of a 26-acre tract which reduced the permissible densities, a practice commonly referred to as "downzoning." In the course of its opinion the Virginia Supreme Court said:

"Under the private enterprise system, land use is influenced by the profit motive. Profit flows from investments of time, talent, and capital. Landowners venture investments only when the prospects of profit are reasonable. Prospects are reasonable only when permissible land use is reasonably predictable. The Virginia landowner always confronts the possibility that permissible land use may be changed by a comprehensive zoning ordinance reducing profit prospects; yet, the Virginia statutes assure him that such a change will not be made suddenly, arbitrarily, or capriciously *but only after a period of investigation and Community planning."* *Id.* at 658 and 892. (Emphasis added.)

In Michigan, the Supreme Court of that state followed a line of reasoning akin to that in *Udell* v. *Haas.* In *Raabe* v. *City of Walker,* 383 Mich. 165, 174 N.W.2d 789 (1970), homeowners challenged the validity of a zoning amendment which reclassified neighboring property from agriculture to industrial. The court noted the statutory requirement that zoning be "in accordance with" a plan. The

court held that the absence of a plan was a major consideration when it invalidated the amendment:

> "The absence of a formally adopted municipal plan, whether mandated by statute or not, does not of course invalidate municipal zoning or rezoning. But it does as in *Biske, supra,* [*Biske* v. *City of Troy,* 381 Mich. 611, 166 N.W.2d 453 (1969)] weaken substantially the well-known presumption, which, ordinarily attends any regular-on-its-face municipal zoning ordinance or amendment thereof. This is particularly true of an ordinance purposed toward contradictory rezoning, after years of original zoning upon which concerned persons have come to depend." (At 178, 796)

An intermediate Illinois court has considered the relationship of planning and forethought to zoning changes and has held that the lack of planning and deliberation weakens the presumption of validity that usually attaches to municipal zoning decisions. In *Forestview Homeowners Ass'n, Inc.* v. *County of Cook,* 18 Ill. App. 3d 230, 309 N.E.2d 763 (*Leave to Appeal den'd,* 56 Ill.2d 582 (1974)) the court held:

> "There is recurring recognition that a comprehensive plan is a factor to be considered in determining the validity of an amendatory ordinance adopted by the zoning authorities of a county.
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> • • •
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> "A comprehensive zoning plan is a scheme or formula of zoning that reasonably relates to the regulation and restriction of land uses including establishment of districts therefore, to the health, safety and welfare of the public, and thus to the police power. *Hadley* v. *Harold Realty Co.* (1964), 97 R.I. 403, 408, 198 A.2d 149. It is a plan relevant in determining whether a zoning change is in harmony with the orderly utilization of property in a locality.

> "'Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs.' (*City of Aurora* v. *Burns,* 319 Ill. 84, 95, 149 N.E. 784; 1 Rathkopf, The Law of Zoning and Planning 9-1 (3d ed. 1972); Haar, In Accordance With a Comprehensive Plan, 68 Harv. L. Rev. 1154, 1170 (1955). This being so, we are constrained to agree that *the failure of Cook County to plan comprehensively* for the use and development of land in its unincorporated areas, and its failure to relate its rezoning decisions to data files and plans of other related county agencies, *weaken the presumption of validity which otherwise would attach to a county zoning ordinance. Compare Udell* v. *Haas* (1968), 21 N.Y.2d 463, 288 N.Y.S. 2d 888, 235 N.E.2d 897; see Annot., 40 A.L.R. 3d 372." (*Id.* at 240, 241, 243, 771, 773) (Emphasis added.)

Finally, an Ohio Appellate court has set forth the quality of deliberation and planning that must support the zoning process in that state:

> "Zoning classifications must be based on a comprehensive plan for the development of a governmental unit. Such a plan requires the gathering and analysis of data on existing land uses and the reasonably foreseeable needs based upon population, economics, living and transportation patterns, and all the many factors that do, or may in the future, affect the unit's physical development. Washington Township's geographical area was created for political and governmental purposes. As to its land use, it is on the fringe of a large and rapidly growing major metropolitan complex. In that context it is a very small part of a very large population center. Great portions of the township are presently undeveloped, but its population and construction rates face rapid increases. Yet in the appellant's evidence there is a great dearth of qualified expert opinion to establish the relationship or place of this small township's growth to the general

conditions which are affecting it. On the contrary, it is difficult to escape the feeling that the zoning scheme here was largely developed by township officials with an insular outlook and without substantial professional advice. While the burden of proof was on the plaintiff-appellee, the failure of appellant's evidence to establish any substantial underlying basis for the 'plan' of the township's development has considerable bearing in determining the manifest weight of the evidence." *Grant* v. *Washington Twp.*, 1 Ohio App. 2d 84 at 87, 203 N.E.2d 859 at 861-862 (1963). *See also Garber* v. *Joseph Silken & Co.*, 33 Ohio Misc. 178, 293 N.E.2d 333 (1972).

These recent cases are no more than illustrations of the growing body of state court decisions which insist that *the process by which change is considered* and which particularly affects selected owners of private property must be based upon a considered balancing of private rights and the public interest.

4. The judicial view, supported by state legislative revisions, that the zoning process be based upon a separate and comprehensive plan.

In *City of Louisville* v. *Kavanaugh*, 495 S.W.2d 502 (Ky. 1973), the Court of Appeals of Kentucky held that a refusal of the city's legislative body to rezone a parcel of land from single-family residential to multiple-family was invalid because that refusal was inconsistent with a land use plan enacted separately from the zoning ordinance:

"The record before the planning commission and the legislative body conclusively demonstrated that the existing [single family] zoning classification was not appropriate. It had been found that the R-5 zoning classification was inappropriate from a planning standpoint by the adoption of the comprehensive land use plan. The recommendation of the planning commission was to bring the zoning category in conformity with the previous finding made in the plan." *Id.* at 505.

Two earlier Kentucky decisions were cited by the court as support for its opinion. *Ward* v. *Knippenberg*, 416 S.W.2d 746 (Ky. 1967), and *Fallon* v. *Baker*, 455 S.W.2d 572 (Ky. 1970).

The decision on the importance of a separate master plan which has probably received the most attention is *Fasano* v. *Board of County Commissioners of Washington County*, 264 Ore. 574, 507 P.2d 23 (1973). In the course of passing upon the validity of a zoning change, the Supreme Court of Oregon commented extensively upon the nature of the comprehensive plan.

"The basic instrument for county or municipal land use planning is the 'comprehensive plan.' Haar, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955); 1 Yokley, Zoning Law and Practice, § 3-2 (1965); 1 Rathkopf, The Law of Zoning and Planning, § 9-1 (3d ed. 1969). The plan has been described as a general plan to control and direct the use and development of property in a municipality. *Nowicki* v. *Planning and Zoning Board*, 148 Conn. 492, 172 A.2d 386, 389 (1961).

• • •

"Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. *The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.*" *Id.* at 582 and 27. (Emphasis added.)

Disputes over particular changes are essentially disputes between private interests—neighbors versus the applicant. The plan, when adopted independently of the ordinance, whether it consists of stated policies or maps, or both, serves as a benchmark against which to measure the consistency and fairness (the due process) of the action taken in these particularized and often heated disputes.

A more complete list of cases where the state courts have stressed the importance of planning as a protection against arbitrariness appears in the Appendix to this Brief.

The state courts have perhaps moved with greater speed than the state legislatures to make more certain that the balance between the police power and private rights is maintained through planning. Today, however, significant steps are being taken by state legislatures to mandate in more precise language than the 1922 Standard Zoning Enabling Act that the use of the zoning power be based upon planning—that is, upon forethought. A synopsis of these state legislative reforms appears in the Appendix to this Brief. We may expect a more strenuous insistence by state legislatures that the zoning process have a more equitable foundation based on planning, particularly with increased federal encouragement of comprehensive planning. *See* Housing Act of 1954, § 701, 40 U.S.C. § 461 (1970).

5. The recent judicial view that when a local legislature acts upon a petition for a zoning amendment it is engaged in an adjudicatory process.

The traditional rubric in zoning law had been that an amendment to the zoning ordinance, because it is granted by the local legislature, is a "legislative" act. *See, e.g., Johnston* v. *City of Claremont,* 49 Cal.2d 826, 323 P.2d 71 (1958); Mandelker, *Delegation of Power and Function in Zoning Administration,* 1963 Wash. U.L.Q. 60.

The most recent effort by courts to bring greater fairness and to reduce the risk of arbitrariness in the zoning change process appears in those cases which have rejected this conventional view. These courts insist that in such individual requests the local legislature is acting as an adjudicative body to resolve particular disputes. Therefore, the standards of disclosure, record keeping and impartiality which it must meet are those traditionally expected of administrative bodies. The evolution of this approach has roots both in the judicial suspicion of the favoritism underlying "spot zoning," and in the fear of undue pressure by opponents of a proposed change.

In these cases the courts have drawn a distinction between the role of the legislature when it adopts a comprehensive zoning ordinance or a plan, applicable to all, and when the same legislature makes decisions on requests by individuals for particular changes from the general scheme.

The *Fasano* decision, *supra,* has one of the strongest opinions on the different roles of the local legislative body in each of these instances:

> "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its property is subject to an altogether different test." *Id.* at 580, 581 and 26.

The Supreme Court of Washington made the same sort of distinction a year before *Fasano* in *Fleming* v. *City of Tacoma,* 81 Wash. 2d 292, 298, 502 P.2d 327, 331 (1972):

> "Zoning decisions may be either administrative or legislative depending upon the nature of the act.

[Citing cases.] But, whatever their nature or the importance of their categorization for other purposes, zoning decisions which deal with an amendment of the code or reclassification of land thereunder must be arrived at fairly. The process by which they are made, subsequent to the adoption of a comprehensive plan and a zoning code, is basically adjudicatory.

"Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

"Another feature of zoning amendment decisions, which distinguishes them from other types of legislative action, is their localized applicability. Other municipal ordinances which affect particular groups or individuals more than the public at large apply throughout an entire geographic area within the municipal jurisdiction, whereas ordinances that amend zoning codes or reclassify land thereunder apply only to the immediate area being rezoned.

"*Decisions which amend or change conditions under existing zoning laws therefore require an extremely sensitive balance between individual rights and the public welfare.*" *Id.* at 295 and 329, 331. (Emphasis added.)

In October, 1975 the Colorado Supreme Court in *Snyder* v. *City of Lakewood,* 542 P.2d 371 (1975) made the following distinction:

"In a challenge to a general zoning ordinance, the outcome turns on the exercise of the police power as bearing a reasonable relation to the public health,

safety, morals or welfare, *Euclid* v. *Ambler Realty Co., supra,* while the real issues involved in a rezoning case focus on the reasonableness of City Council's application of the statutory criteria *to the evidence presented.*" (Emphasis added.)

The Colorado court acknowledged that the traditional label of a "legislative" act was misplaced when the issue was a rezoning:

"Although our early decisions viewed the enactment of *rezoning* ordinances as a legislative function, the more recent decisions have held such activity to be a quasi-judicial function and reviewable under Rule 106(a)(4). In so doing, we have distinguished between the adjudicative process involved in enacting a *rezoning* ordinance and the legislative process involved in passing the general zoning ordinance. [Omitting footnotes.] This distinction was concisely drawn by the Supreme Court of Washington in *Fleming* v. *Tacoma,* 81 Wash.2d 292, 502 P.2d 327 (1972)" [cited *supra,* p. 33].

See also *Dillon Companies, Inc.* v. *City of Boulder,* 183 Colo. 117, 515 P.2d 627 (1973); and *Wheeler* v. *County of Adams,* 519 P.2d 327 (Colo. 1974).

The rationale of these cases has been replicated in other recent decisions in which the courts have rejected the traditional rule that any act by a legislature is legislative and not subject to standards. These courts recognize that in *rezoning* cases what is most often at stake is a dispute between competing private interests, on the one side the petitioner, on the other side the neighbors. *See, e.g., West* v. *City of Portage,* 392 Mich. 458, 221 N.W.2d 303 (1974); *Forman* v. *Eagle Thrifty Drugs and Markets,* 89 Nev. 533, 516 P.2d 1234 (1973).

This recognition by state courts of what is really going on in disputes involving zoning changes, in fact, is not all that recent. Courts have recognized for two decades that in such cases *private* interests are at issue. *See, e.g., Kelley* v. *John,* 162 Neb. 319, 75 N.W.2d 713 (1956); *Aldom* v. *Borough of Roseland,* 42 N.J. Super. 495, 127 A.2d 190 (1956).[12]

It is not the purpose of *amici* to argue whether the grant or denial of a zoning change is "administrative" or "legislative." What is significant is not the label attached to the process of acting upon petitions for change in zoning but the reason why the courts are responding in such fashion. This is one more link in the protective chain of due process, both substantive and procedural, that the state courts are constructing in the field of land use law.

In these ways the state courts are fashioning and requiring standards in the zoning process which would be consistent with the commands of the XIV Amendment to the Federal Constitution. It is in that context that planning (*e.g.*, forethought, deliberation, analysis) provides a constitutional shield against capricious action by the ma-

[12] "The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and it is entitled to be free from those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency." R. Babcock, *The Zoning Game* 158 (Univ. Wis. Press, 1966).

jority at the expense of the minority in the land use process.[13]

Without the forethought and deliberation that planning compels, the delicate constitutional balance on which the law of zoning is bottomed would be overturned. The Eastlake charter provision threatens the deliberative process that Bettman described in his brief, that this Court in *Euclid* understood, and that the state courts these last fifty years have been striving to bring to the zoning process.

For these reasons state courts, in addition to the Ohio Supreme Court, have not been sympathetic to referenda on zoning changes.[14]

TO SUBJECT LAND USE DECISIONS WITH RESPECT TO PARTICULAR TRACTS OF LAND TO REFERENDUM IS A DENIAL OF DUE PROCESS BECAUSE IT UNDERMINES THE ASSURANCE OF FAIRNESS THAT IS THE PRODUCT OF PRIOR PLANNING.

The risk of a capricious or whimsical decision with respect to any specific request for rezoning of a particular

[13] There are, of course, many other persuasive reasons of public polity, fiscal, social and aesthetic, for urban planning. As one might surmise, there are also disagreements among professional planners on the appropriate scope and nature of the planning process. We are concerned here with one role of planning: as a means better to ensure that there is a fair allocation of a reciprocity of benefits among landowners who are subject to restrictions on the right to use their land.

[14] This brief has focused almost exclusively on zoning decisions of state courts. This reflects the history of zoning during the past fifty years. Only a very few of the more than 10,000 zoning decisions have been brought in the federal courts. Zoning, therefore, is a field of law where the burden of understanding the process and its ills has fallen almost exclusively within state courts.

tract of land is always present. As we have seen, the presence of that risk has increasingly led the state courts to insist on evidence of careful, comprehensive planning as their best assurance that a particular land use decision protected individual rights and responded to the genuine needs of the public instead of to irrelevant considerations such as who made the request or how numerous, vocal or well-organized objections were. If every rezoning *must* be the subject of a referendum, then the deliberative process that is embodied in comprehensive planning is frustrated and the vitality of the plan debilitated.

The decision of the Ninth Circuit in *Southern Alameda Spanish Speaking Organization (SASSO)* v. *City of Union City,* 424 F.2d 291 (9th Circuit, 1970), illustrates that risk. In that instance SASSO successfully sought the rezoning of a tract of land to a multi-family classification to permit the construction of a federally financed housing project for low and middle income families. The rezoning was consistent with a draft master plan which, according to the court, had been in large part accepted by its city officials who had "informally abandoned the 1962 plan's designation of appropriate future use in favor of the updated designations regarded as more appropriate in light of its city's growth." Almost immediately after the rezoning was approved, it was nullified by a city-wide referendum. The Court of Appeals rejected the contention that the application of referendum procedures to rezoning violated due process requirements, saying:

> "A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." (424 F.2d at 294)

What the Ninth Circuit failed to appreciate was that the referendum in *SASSO* did not involve the draft master plan as a whole but was instead simply an item veto of one land use recommendation in the plan. If the referendum process may be used to nullify decisions that are consistent with the master plan, then the result is not "the city itself legislating through its voters." Instead it is the city stultifying itself.

The state courts have been, for the most part, less rhapsodic about the virtues of referendums when the issue has been the zoning classification of a particular parcel of land. Thus the state decisions emphasize the distinction between a referendum on a general plan or a comprehensive zoning ordinance and a decision with respect to the zoning of a specific piece of land. The decision of the Minnesota Supreme Court in *Minneapolis Honeywell Regulator Co.* v. *Nadasdy,* 247 Minn. 159, 76 N.W. 2d 670 (1956), a proceeding in mandamus to compel a village council to issue a building permit, is an instructional example. Although the pertinent enabling legislation contained a proviso that alterations in zoning plans were to be made only upon two-thirds vote of the local governing body, the Minnesota court did not rely solely on the conflict between the statutory provisions for referendum and the specifics of the zoning legislation. Instead, the court went on to hold:

> "While the referendum provision of the statute has not heretofore been construed by this court, we believe that the reasonable and proper construction of the statute supports the position of the plaintiff to the effect that the referendum-election provision applies only to a comprehensive type of zoning ordinance and does not apply to an altering or amending ordinance." (247 Minn. at 165, 76 N.W.2d at 675)

The Nevada Supreme Court expressed a similar opinion in *Forman* v. *Eagle Thrifty Drugs and Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973):

> "We think that whether or not the citizens of a state wish to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when, as in the present case, such policy has been determined and the changing of such areas, or the granting of exceptions has been committed to the planning commission and the city council in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance, such action is administrative and not referable." (89 Nev. at 537-8, 516 P.2d at 1237)

See also: *O'Loane* v. *O'Rourke*, 231 Cal. App.2d 774, 42 Cal. Rptr. 283 (1965).[15]

The more recent state decisions that have considered the applicability of referendum provisions to the rezoning of

[15] There are a parallel group of decisions that involve the question of whether the initiative process may be used to adopt or amend zoning regulations. These decisions involve the additional complication of whether the initiative process violates due process by omitting the notice and hearings that would otherwise be required. *City of Scottsdale* v. *Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968), *Smith* v. *Township of Livingston*, 106 N.J. Super. 444, 256 A. 2d 85 (1969) and *Dewey* v. *Doxey-Layton Realty Co.*, 3 Utah 2d, 1277 P.2d 805 (1954) with *San Diego Building Contractors Ass'n* v. *City Council of the City of San Diego*, 118 Cal. Rptr. 146, 529 P.2d 570 (1974) and *Builders Ass'n of Santa Clara-Santa Cruz Counties* v. *Superior Court of Santa Clara County*, 118 Cal. Rptr. 158, 529 P.2d 582. And cf. *Associated Home Builders of Greater Eastbay, Inc.* v. *City of Livermore*, 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (1974).

particular tracts of land have rejected the claim that such decisions are "legislative" in any meaningful sense of that word.[16] Decisions with respect to zoning limitations on a particular piece of land are more administrative or adjudicative than legislative because they involve the land of private interests in the use of land (*i.e.*, the landowner vs. his neighbors) and also because, when there is a plan, the consistency of the proposed rezoning with the plan must be evaluated.

As the Nevada Supreme Court expressed the distinction, in *Forman* v. *Eagle Thrifty Drugs and Markets, supra:*

> "This legislative-administrative dichotomy is often vague, but it is this very vagueness which has given the courts considerable leeway in balancing two competing interests: that of protecting government from unwarranted harassment and the equal interest in protecting benefits to be won through direct legislation." (At 537 and 1236)

In circumstances that are very similar to this case, the Michigan Supreme Court ruled in *West* v. *City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974), that an amendment to a city zoning ordinance changing the zoning with respect to a particular piece of property was not subject to a referendum. The court held:

[16] There are older decisions that hold the referendum process applicable without considering all of the implications of the rule. See, *Dwyer* v. *City Council of Berkeley*, 200 Cal. 505, 253 P. 932 (1927); *Jackson* v. *Denver Producing and Refining Co.*, 96 F.2d 457 (10th Cir. 1938), and *State ex rel. Hunzicker* v. *Pulliam*, 168 Okla. 632, 37 P.2d 417 (1934). (The latter two decisions involve the same Oklahoma City Ordinance that extended the zone in which oil wells could be drilled.)

"The issue is whether an amendment to a city zoning ordinance changing the zoning of particular property is subject to a referendary vote of the electors of the city.

"We hold that such a change in zoning is not subject to a referendum. The right of referendum extends only to legislative acts. A change in the zoning of particular property, although in form (amendment of a zoning ordinance) and in traditional analysis thought to be legislative action, is in substance an administrative not legislative, act." (342 Mich. at 460-61, 221 N.W.2d at 304)

In the *West* decision the Michigan court relied upon similar decisions from other jurisdictions, including *Kelley* v. *John,* 162 Neb. 319, 75 N.W.2d 713 (1956) and *Bird* v. *Sorenson,* 16 Utah 2d 1, 394 P.2d 808 (1964). In *Kelley* the Nebraska Supreme Court held:

"An ordinance changing the classification of property from residential to business use after the adoption of a comprehensive zoning plan is an administrative or executive matter, and not subject to referendum laws applicable to municipalities." (162 Neb. at 319, 75 N.W.2d at 714)

And in *Bird* the Utah court agreed:

"The City of Washington Terrace has in effect a master zoning plan ordinance. Subsequent to its adoption, the City Council passed an ordinance changing the classification of certain property from residential to commercial use.

• • •

The ordinance in question was passed after the requested change had been studied and recommended by the planning commission and after a public hearing had been held. The determinative question is whether or not the action of the City Council *was administrative or legislative. If the former, it is not subject to referendum.* We so hold, based upon logic and prior decisions of this court. *If each change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative. Such changes are administrative acts implementing the comprehensive plan and adjusting it to current conditions."* (16 Utah 2d at 1-2, 394 P.2d at 808.) (Emphasis added.)

A New York court explained why the referendum provision is inherently inconsistent with comprehensive planning:

"It may be noted that the sections of the General City Law and similar ones in the Town Law, [§§261, 265] and the Village Law, [§§175, 179] set forth a method and procedure, State-wide in operation, by which municipalities may avail themselves of the right to zone the land within their boundaries. These statutes require that any zoning law shall be based on a well-considered and comprehensive plan by means of which the land in the municipality may be used for purposes for which it is best suited and all reasonably necessary uses may be provided for. If, after the adoption of a zoning ordinance, meeting these requirements, some of its provisions may be deleted by a referendum of the electors, the comprehensiveness mandated by the Legislature could well be destroyed. Essential uses, such as for churches and schools, could be barred from the municipalities.

In the instant case, while the Common Council may comply with Section 83 of the General City Law in amending the New Rochelle Zoning Ordinance, as it here did, its legislation and the city's compliance with the said section could be completely nullified if such acts were subject to a referendum of the electors of the city. This would create, as it has here, a situation where there has been formal but ineffective compliance. This would exalt form above substance." *Elkind* v. *City of New Rochelle,* 5 Misc. 2d 296, 301-302, 163 N.Y.S. 2d 870, 876-77 (1957); aff'd 5 N.Y.2d 836, 181 N.Y.S. 2d 509 (1958)

The impact of land use restrictions on private rights in property is often severe—for the owner of the restricted parcel if change cannot be secured, for the owners of nearby land if the restrictions are altered. Each is entitled to expect that due process guarantees will protect him from having his land, or its value, arbitrarily impaired.

The insistence of the courts upon that process of forethought and analysis called comprehensive planning as the central test of fairness will come to nothing if the plan can be overridden by referenda with respect to the use and classification of particular pieces of property. There is no surer way to destroy the guarantees of due process that have been built into land use regulation by the state courts, and co-incidentally, to compel ever increasing resort to the judicial system to correct abuses of the local decision-making process in zoning.

CONCLUSION

In the half a century since the decision in *Euclid* it has fallen to the state courts to put flesh on the frame of that decision which permitted restrictions on the Constitutionally-protected rights in private property in return for public benefits.

The judicial struggle with new concepts and a variety of techniques has not been without false starts, criticism and confusion, but ultimately these state courts have hammered out basic principles—principles necessary to balance an extension of the police power over the use of land with the rights of owners of private property.

Among the most important of these principles are two which have emerged from the mass of decisions during the past fifty years.

1. The process by which a comprehensive zoning ordinance is changed to respond to particular proposals must be in accordance with reasonably discernible standards in order to insure fairness and due process.

2. Comprehensive planning, whether reflected in a separate document or by other evidence of deliberation and forethought is an effective method to advance the requirement for such standards.

Since *Euclid,* comprehensive zoning ordinances have been adopted by thousands of American communities. The cutting edge of land use decision-making has become *how* and *when*—rather than *whether*—land use controls where were permissible.[17] The focus on the necessary standards has shifted to the making of *change* in the existing scheme.

There is no better summation of the position reached by state courts after a half century of case law than this statement by the Connecticut Supreme Court:

> "Balancing the preservation of the status quo with the reasonable pressures for change due to the growth in population and the onslaught of business needs and community requirements is a function of zoning which must best be resolved by the duly authorized legislative municipal body through a logical development of its comprehensive plan." *Jablon* v. *Town Planning & Zoning Commission of Town of Newtown,* 157 Conn. 434, 443, 254 A. 2d 914, 918 (1969).

It is just such a change which Respondent had sought from the City of Eastlake, a change which he had *successfully* achieved, after due deliberation, by plan commission and city council—until the operation of the Eastlake char-

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[17] F. Bosselman and D. Callies, *The Quiet Revolution in Land Use Control,* Council on Environmental Quality (G.P.O.) 1971, p. 2.

ter amendment. By the very operation of its terms—a mandatory popular referendum on each and every land use *change* in the city—all standards, all deliberative processes, all comprehensive planning—fifty years of zoning history —count for nothing. After the fullest consideration of the merits of a change in land use policy, individual property rights are effectively and completely nullified "by the superior force of an interested and overbearing majority'"[18] contrary to law, and contrary to the intent of the framers of our Federal system.

We respectfully submit that the decision of the Supreme Court of Ohio is correct, and accordingly it should be affirmed.

Respectfully submitted,

RICHARD F. BABCOCK
DAVID L. CALLIES
R. MARLIN SMITH

[18] *The Federalist*, No. 10.

APPENDIX

APPENDIX

I. ILLUSTRATIVE STATE COURT DECISIONS ON THE IMPORTANCE OF PLANNING TO ZONING

CALIFORNIA

Cow Hollow Improvement Club v. *Di Bene*, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1966)

O'Loane v. *O'Rourke*, 231 Cal.App.2d 774, 42 Cal. Rptr. 283 (Dist.Ct.App. 1965)

COLORADO

Fontaine v. *Board of County Commissioners of Adams County*, 493 P.2d 670 (Colo.Ct.App. 1972)

CONNECTICUT

Jablon v. *Town Planning & Zoning Commission of Town of Newton*, 157 Conn. 434, 254 A.2d 914 (1969)

Nowicki v. *Planning and Zoning Board of Town of Milford*, 148 Conn. 492, 172 A.2d 386 (1961)

Rosenberg v. *Planning Board of City of Stamford*, 155 Conn. 636, 236 A.2d 895 (1967)

Tarasovic v. *Zoning Commissioner of Town of Trumbull*, 147 Conn. 65, 157 A.2d 103 (1959)

DELAWARE

Green v. *County Planning and Zoning Commission of Sussex County*, 340 A.2d 852 (Del. 1974)

HAWAII

Dalton v. *City and County of Hawaii*, 51 Haw. 400, 462 P.2d 199 (1969)

ILLINOIS

Forestview Homeowners Ass'n, Inc. v. *County of Cook*, 18 Ill.App.3d 230, 309 N.E.2d 763 (*Leave to Appeal den'd*, 56 Ill.2d 582 (1974))

INDIANA

Board of Zoning Appeals of City of Fort Wayne v. *Shell Oil Co.*, 329 N.E.2d 636 (Ind. 1975)

Carlton v. *Board of Zoning Appeals of City of Indianapolis*, 252 Ind. 56, 245 N.E.2d 337 (1964)

Suess v. *Volgelgesang*, 151 Ind. A. 631, 281 N.E.2d 536 (1972)

IOWA

F. H. Uelner Precision Tools & Dies, Inc. v. *City of Dubuque*, 190 N.W.2d 465 (Ia. 1971)

KENTUCKY

City of Louisville v. *Kavanaugh*, 495 S.W.2d 502 (Ky. 1973)

Fallon v. *Baker*, 455 S.W.2d 572 (Ky. 1970)

Fritts v. *City of Ashland*, 348 S.W.2d 712 (Ky. 1961)

Hines v. *Pinchback-Holloran Volkswagen, Inc.*, 513 S.W.2d 492 (Ky. 1974)

Hodge v. *Luckett*, 357 S.W.2d 303 (Ky. 1962)

Ward v. *Knippenberg*, 416 S.W.2d 746 (Ky. 1967)

MAINE

Barnard v. *Zoning Board of Appeals of Town of Yarmouth*, 313 A.2d 741 (Me. 1974)

MARYLAND

Aspen Hill Venture v. *Montgomery County Council*, 265 Md. 303, 289 A.2d 303 (1972)

Board of County Commissioners for Prince George's County v. *Farr*, 242 Md. 315, 218 A.2d 923 (1966)

County Council for Montgomery County v. *District Land Corporation*, 274 Md. 691, 337 A.2d 712 (1975)

Dustin v. *Mayor and Council of Rockville*, 23 Md. App. 389, 328 A.2d 748 (1974)

Heller v. *Prince George's County*, 264 Md. 410, 286 A.2d 748 (1974)

Howard Research and Development Corporation v. *Zoning Board of Howard County*, 263 Md. 380, 283 A.2d 150 (1971)

Montgomery v. *Board of County Commissioners for Prince George's County*, 263 Md. 1, 280 A.2d 901 (1971)

Montgomery County Council v. *Leizman*, 268 Md. 621, 303 A.2d 374 (1973)

Montgomery County Council v. *Pleasants*, 266 Md. 462, A.2d 216 (1972)

Norbeck Village Joint Venture v. *Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969)

Park Construction Corporation v. *Board of County Commissioners for Prince George's County*, 245 Md. 597, 227 A.2d 15 (1967)

Sampson Brothers (Md.), Inc. v. *Board of County Commissioners of Prince George's County*, 240 Md. 116, 213 A.2d 289 (1965)

Scull v. *Coleman*, 251 Md. 6, 246 A.2d 223 (1968)

Valencia v. *Zoning Board of Howard County*, 270 Md. 478, 312 A.2d 277 (1973)

MASSACHUSETTS

Henze v. *Building Inspector of Lawrence*, 359 Mass. 754, 269 N.E.2d 711 (1971)

MICHIGAN

Biske v. *City of Troy*, 381 Mich. 611, 166 N.W.2d 453 (1969)

Padover v. *Farmington Township*, 374 Mich. 622, 132 N.W.2d 687 (1965)
Raabe v. *City of Walker*, 383 Mich. 165, 174 N.W.2d 789 (1970)
Schilling v. *City of Midland*, 38 Mich. App. 568, 196 N.W.2d 846 (1972)

NEBRASKA
Bagley v. *County of Sarpy*, 189 Neb. 393, 202 N.W.2d 841 (1972)
Deans v. *West*, 189 Neb. 518, 203 N.W.2d 504 (1973)

NEW JERSEY
Newark Milk and Cream Company of Newark v. *Township of Parsippany-Troy Hills*, 47 N.J. Super. 306, 135 A.2d 682 (1957)

NEW YORK
Golden v. *Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972)
Heram Holding Corporation v. *City of Albany*, 63 Misc. 2d 152, 311 N.Y.S. 2d 198 (1970)
Town of Bedford v. *Village of Mount Kisco*, 33 N.Y. 2d 178, 351 N.Y.S. 2d 129 (1973)
Udell v. *Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968)

OHIO
Garber v. *Joseph Silken and Company*, 33 Ohio Misc. 178, 293 N.E. 2d 333 (1972)
Grant v. *Washington Township*, 1 Ohio App.2d 84, 203 N.E.2d 859 (1963)

OREGON
Archdiocese of Portland v. *County of Washington*, 254 Or. 77, 458 P.2d 682 (1969)
Baker v. *City of Milwaukie*, 533 P.2d 772 (Or. 1975)
Culver v. *Dagg*, 532 P.2d 1127 (Or. 1975)

Dickinson v. *Board of County Commissioners of Clackamas County*, 533 P.2d 1395 (Or. 1975)
Duddles v. *City Council of West Linn*, 535 P.2d 583 (Or. 1975)
Fasano v. *Board of County Commissioners of Washington County*, 264 Or. 574, 507 P.2d 23 (1973)
Marggi v. *Ruecker*, 533 P.2d 1372 (Or. 1975)
Roseta v. *County of Washington*, 254 Or. 161, 458 P.2d 405 (1969)
Tierney v. *Duris*, 536 P.2d 435 (Or. 1975)

PENNSYLVANIA
Cleaver v. *Board of Adjustment of Tredyffrin Township*, 414 Pa. 367, 200 A.2d 408 (1964)
Doran Investments v. *Muhlenberg Township Board of Commissioners*, 10 Pa. Cmwlth. 143, 309 A.2d 450 (1973)
Jacobi v. *Zoning Board of Adjustment of Lower Moreland Township*, 413 Pa. 286, 196 A.2d 742 (1964)
Pollack v. *Zoning Board of Adjustment*, 342 A.2d 815 (Pa. 1975)
Schubach v. *Silver*, 336 A.2d 328 (Pa. 1975)

RHODE ISLAND
Toole v. *May-Day Realty Corporation*, 101 RI 379, 223 A.2d 545 (1966)

VIRGINIA
Board of Supervisors of Fairfax County v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975)
Board of Supervisors of Fairfax County v. *Snell Construction Co.*, 214 Va. 655, 202 S.E.2d 889 (1974)
Southern Ry. Co. v. *City of Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964)

WASHINGTON

Sonneland v. *City of Spokane*, 4 Wash. App. 865, 484 P.2d 421 (1971)

State ex rel. Randall v. *Snohomish County*, 79 Wash. 2d 619, 488 P.2d 511 (1971)

II. STATUTES REVISING AND STRENGTHENING THE REQUIREMENT FOR PLANNING AS A FOUNDATION FOR REGULATION OF LAND

ALASKA

Alaska Stat. Title 29 ch. 33, § 29.33.085(b) (1972) "The assembly shall adopt a comprehensive plan based upon the recommendation of the planning commission."

Alaska Stat. Title 29 ch. 33, § 29.33.090(a) (Supp. 1975) "In accordance with the comprehensive plans the assembly shall regulate and restrict the use of land. . . ."

ARIZONA

Ariz. Rev. Stat. Ann., § 9-461.05 A. (Supp. 1975) "Each planning agency shall prepare and the legislative body of each municipality shall adopt a comprehensive, long-range general plan for the development of the municipality."

Ariz. Rev. Stat. Ann., § 9-462.01 E (Supp. 1975) "All ordinances of regulations adopted under this article shall be consistent with the adopted general and specific plans of the municipality, if any, as adopted under Article 6."

CALIFORNIA

Cal. Code Ann., Government Code, Title 7, Art. 5 § 65300 (West. 1966) "Each planning agency shall prepare and legislative body of each county and city shall adopt a comprehensive, long-term general plan . . ."

Cal. Code Ann., Government Code, Title 7, Art. 2 § 65860(a) 1975) "County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974."

Cal. Code Ann., Government Code, Title 7, Art. 2, § 65860(c) (West Supp. 1975) "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to such a plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended."

DELAWARE

Del. Code Ann. Title 9, ch. 68, § 6807(a) (1975) "The commission shall prepare a plan as expressed in maps, figures, and text which shall, among other elements, include: . . . existing and proposed patterns and intensity of land use . . . ."

Del. Code Ann. Title 9, ch. 69, § 6904(a) (1975) "Regulations adopted by the county government pursuant to the provisions of this chapter, shall be in accordance with the approved comprehensive development plan . . . ."

DISTRICT OF COLUMBIA

Dist. of Col. Code Encyclopedia Ann. ch. 10, § 1-1002(a)(4)(D) (Supp. 1975-76) "The Commission and the Commissioners shall jointly publish, from time to time as appropriate, a comprehensive plan for the National Capital . . . ."

Dist. of Col. Code Encyclopedia Ann. ch. 4, §5-414 (Supp. 1975-76) "Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the National Capital . . . ."

FLORIDA

Fla. Session Laws ch. 75-257, § 4(2) (West. 1975) "On or before July 1, 1979, each county and each municipality in this state shall prepare and adopt a comprehensive plan . . . ."

Fla. Session Law ch. 75-257, § 12(1) (West 1975) "All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan. . . ."

Fla. Session Law ch. 75-257, § 14 (West. 1975) "It is the intent of the act that the adoption and enforcement by a governing body of regulations for the development of land . . . shall be based on, related to, and a means of implementation for an adopted comprehensive plan as required by this Act."

HAWAII

Hawaii Rev. Stat., Title 13, ch. 205, §§ 205-1 to 15 (1968) and (Supp. 1974) These sections establish a state land use commission with responsibility for placing all land in the state within one of the following land use districts: urban, rural, agricultural and conservation. County governments may zone land within each of these land use districts except the conservation district which is governed by the department of land and natural resources.

IDAHO

Idaho Code Ann. § 67-6508 (Supp. 1975) "It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the plan."

Idaho Code Ann. § 67-6511 (Supp. 1975) "Each governing board shall . . . establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the adopted plan."

INDIANA

Ind. Stat. Ann. Title 18, ch. 2, § 18-7-2-31 (1974) "After the creation of the metropolitan planning department, the metropolitan plan commission shall as expeditiously as possible establish a comprehensive or master plan of the county. . . ."

KENTUCKY

Ken. Rev. Stat. ch. 100, § 100.201 (1971) "Cities and counties which are members of a planning unit which has adopted at least the objectives of the land use plan elements may divide the territory within their area of their jurisdiction into zones . . . ."

Ken. Rev. Stat. ch. 100, § 100.213 (1971) "Before any map amendment is granted, the planning commission or the legislative body or fiscal courts must find that the map amendment is in agreement with the community's comprehensive plan, or, in the absence of such finding, that one or more of the following apply . . . ."

MAINE

Maine Rev. Stat. Ann. Title 30 § 4962.1A (Supp. 1973) "Such [zoning] ordinance or provision shall be pursuant to and consistent with a comprehensive plan adopted by its legislative body."

NEBRASKA

Neb. Rev. Stat. ch. 19, § 19-901 (Supp. 1975) "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative bodies in cities . . . and in villages may adopt zoning regulations. . . . Such powers shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan . . ., adopted such comprehensive development plan. . . ."

Neb. Rev. Stat. ch. 19, § 19-903 (Supp. 1975) "The regulations and restrictions authorized by sections 19-901 to 19-915 shall be made in accordance with a comprehensive development plan. . . ."

Neb. Rev. Stat. ch. 23, § 23-114.01 (2) (Supp. 1975) "The county planning commission shall prepare and adopt as its policy statement a comprehensive development plan. . . ."

Neb. Rev. Stat. ch. 23, § 23-114.03 (1974) "Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board. . . ."

OREGON

Ore. Rev. Stat. ch. 197, § 197.175(2) (1973). "Pursuant to [various Oregon statutes] each city and county in this state shall:

(a) Prepare and adopt comprehensive plans consistent with state-wide planning goals and guidelines approved by the commission; and

(b) Enact zoning, subdivision and other ordinances and regulations to implement their comprehensive plans."

PENNSYLVANIA

Penn. Stat. Ann. Title 53 ch. 30 § 10703 (1972) "Every ordinance and all amendments thereto adopted pursuant to this article shall be based on and interpreted in relation to the comprehensive plan for the development of the municipality prepared under the provisions of this act."

WYOMING

Wyo. Stat. ch. 14, § 9-856(a) (Supp. 1975) "All local governments shall develop a land use plan within their jurisdiction. The plans shall be consistent with established state guidelines and be subject to review and approval by the commission."